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Dow Lohnes

Michael D. Hays
D 202.776.2711 E mhays@dowlohnes.com

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Federal Communications Commission
Office of the Secretary

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, SW
Washington. DC 20553

Re: Petitions for Declaratory Rulings Regarding Wireless Early Termination Fees
WT Docket Nos. 05-193, 05-194
Ex Parte Presentation

On behalf of SunCom Wireless Operating Company, L.L.C. ("SunCom"), we hereby: (1) respond to questions posed by Consumer & Governmental Affairs Bureau staff regarding the impact of rhe Eleventh Circuit's decision in *National Association of State Utility Consumer Advocates v. FCC*,[1] on the Commission's authority to designate early termination fees ("ETFs") as rates charged under Section 332(c)(3)(A) of the Communications Act;[2] and (2) provide a further explanation of why ETFs have been an integral part of the rates SunCom has charged for wireless service. In addition, SunCom continues to support resolving the CTIA and SunCom petitions in a single order, as both SunCom and CTIA previously requested.

First, SunCom clarifies that the Eleventh Circuit's decision in *NASUCA* to reverse the Commission's *Second Truth-in-Billing Order* in no way limits the Commission's authority to define ETFs as "rates charged" in the current proceedings.[3] If anything, the Eleventh Circuit's analysis reinforces SunCom's and CTIA's position that defining ETFs as "rates charged" fits squarely within the Commission's authority under Section 332. The *NASUCA* decision had nothing to do with ETFs or any other rates, rate elements, charges, or fees imposed on wireless customers. The issue in *NASUCA* was whether state regulation of line items on customers' bills is a permissible exercise of state authority over "other terms and conditions" of wireless service.[4] The court found that states may regulate line-item billing because it "affects *thepresentation* of the charge on the user's bill . . . it does not affect the *amount* that a user is charged for service."[5] Thus, the court drew a clear distinction between the amount that customers are charged for service on the one hand, and the manner in which those costs are displayed on a billing statement, on the other. The court's analysis, considered in conjunction with Commission precedent, confirms that state regulation **of** ETFs is prohibited

[1] 457 F.3d 1238 (2006)("*NASUCA*")

[2] 47 U.S.C. § 332(c)(3)(A).

[3] Truth-In-Billing and Billing Format, *Second Report und Order, Declaratory* **Ruling,** *and Second Further Notice of Proposed Rulemaking*, 20 FCC Rcd 6448 (2005).

[4] *NASUCA*, 457 F.3d at 1254-1258.

[5] *Id.* at 1254, 1255 (citations omitted and emphasis added).

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The Eleventh Circuit's analysis of the distinction between rates and other terms and conditions under the Act and Commission precedent shows that the only reasonable conclusion in this case is that ETFs are rates. The *NASUCA* court concluded that the Commission failed to follow its previous precedent holding that Section 332 defines rates as a charge for a service and distinguishing rates from "other terms and conditions" based on whether the regulation at issue would restrict wireless carriers' ability to set unregulated charges for services.[6] The court held that the Commission erred in attempting to invalidate state line-item regulations because "these regulations do not require a carrier to recover nor prohibit a carrier from recovering a particular cost. These regulations pertain only to the presentation of that cost on customer bills."[7] The *NASUCA* court did not, therefore, question Commission precedent preempting state regulations that limit the amount wireless carriers can charge or the structure of those charges.

Classifying ETFs as rates would be consistent with the Commission's past distinctions between "rates charged" and "other terms and conditions." The record in this proceeding demonstrates unequivocally that customers receive a tangible benefit in the form of discounted rates for the length of the term in exchange for entering into term contracts with ETFs.[8] When a customer is charged an ETF, the effect is to adjust the terminating customer's rate charged for service to a level that better approximates what the customer would have paid had they not agreed to a term contract. Consequently, ETFs are an important part of the charge that wireless carriers collect from customers in exchange for the wireless telephone service they provide.

SunCom and the other CMRS industry commenters in these proceedings also have demonstrated beyond any doubt that ETFs are an integral part of their rate structures and an instrument used for recovering the costs of initiating and continuing service to their customers.[9] Some commenters have claimed that ETFs cannot be part of wireless rates or rate structures because the fees ultimately are paid by only a small percentage of wireless customers."[10] This argument fails because ETFs are designed in part to recoup a number of the costs carriers incur to commence and guarantee continuation of service over the agreed term. These costs do not decline even if

[6] *See id.* at 1254-55. The court noted that the Commission had previously held that "a consumer receives no tangible product" in return for each particular line-item charge. The court found this previous Commission pronouncement to be in direct and unexplained conflict with the Commission's decision in the Second Truth in Billing Order. *See id.* at 1255 (citing Truth-in-Billing and Billing Format, *First Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 7492, 7531 (1999)).

[7] *Id.*

[8] The Commission itself has recognized that CMRS carriers typically offer customers a number of calling plans, including higher-rated prepaid or "pay-as-you go" plans that have no contract term and hence no ETF, and discounted plans that offer a lower monthly rate (and, in some cases, free or discounted equipment) in exchange for the customer agreeing to a term contract with an ETF designed to help recoup lost revenue in the event of early termination. *See, e.g.*, Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Ninth Report*, 19 FCC Rcd 20597, 20600 (2004).

[9] *See, e.g.*, CTIA Reply Comments at 4-18; Nextel Comments at 18-21; Sprint Comments at 8-9.

[10] *See* Letter from Edward Meirzwinski, Consumer Program Director, U.S. Public Interest Research Group to Marlene H. Dortch. WT Docket Nos. 05-193, 05-194 (filed August 16,2005).

customers terminate their contracts early. These costs include equipment subsidies, advertising, activation. network improvements, software upgrades, data collection, and a number of other fixed overhead costs that are funded by revenue from customers." The ETF is designed to ensure that early-terminating customers pay a defined and predictable share of those costs. That a relatively small number of customers ever end up paying an ETF is not relevant to whether the ETF is part of the rate charged by a wireless carrier. If anything, wireless carriers' projections of how many customers will pay the ETF may influence the price level at which carriers set the fee, but there is no doubt that ETFs perform the cost-recovery function of rates.

Moreover, the only relevant Commission precedent confirms that ETFs generally are part of the rate structure carriers establish for providing their services to the public, and decisions incorporating that recognition have been upheld by the courts." The best-reasoned federal court decisions have followed the Commission's logic, with one district court remarking that:

> This case is similar to *Redfern v. AT&T* Wireless Services, *Inc.* [citation omitted]. There, the defendant argued that the early termination fee was an essential component of the rates charged for its mobile services. In support of its contention, the defendant explained that lower rates are offered on term plans because the early termination fee accounts for planned future earnings. On the other band, plans with no expiration date charge higher rates because there is no early termination fee.
>
> It seems clear that the [early termination fee] is directly connected to the rates charged for mobile services, and any challenge to such a fee is preempted by federal law. . . .[13]

Classifying ETFs as rates would require the Commission to do no more than conclude that ETFs have the same characteristics as it traditionally has attributed to "rates charged." That conclusion flows directly from the reasoning employed in Commission precedent and by the *NASUCA* court.

In further efforts to justify its narrow holding, the *NASUCA* court also found that the *Second Truth-in-Billing Order* failed to establish that line-item regulation would have the kind of direct and concrete effect on wireless rates that the Commission had required in previous Section 332 preemption decisions.[14] In particular, the Eleventh Circuit cited *Pittencrieff* as an example of a case whcrc the Commission approved state universal service fund ("USF") contribution obligations that imposed direct costs on carriers without concluding that the likely effect on rates amounted to rate

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[11] *See* SunCom Petition, Declaration of Charles Kallenbach at ¶¶ 6-8; CTIA Reply Comments at 12

[12] *See* Ryder Communications, Inc. v. AT&T Corp., *Memorandum* Opinion *and* Order, 18 FCC Rcd 13603 (2003); *see also MCI Telecomms. Corp. v. FCC*, 822 F.2d 80, 86 (D.C. Cir. 1987); ***Equip. Distribs.' Coalition, Inc. v. FCC***, 824 F.2d 1197, 1201 (D.C. Cir. 1987).

[13] *Chandler v. AT&T Wireless Services, Inc.*, No. 04-180-GPM, slip op. at 2 **(S.D. Ill.** July 21, 2004) (citing *Redfern v. AT&T Wireless* Services, *Inc.*, No. 03-206-GPM, slip op. at 1-2 (S.D. Ill. June 16, 2003)).

[14] *NASUCA*, 457 F.3d at 1256.

regulation." *Pittencrieff* does not bind the Commission here because that case involved a charge imposed by state governments that was specifically authorized by a separate section of the Communications Act.[16] In this case, proponents of state regulation of ETFs can point to no source of authority other than Section 332 itself. They nonetheless ask the Commission to hold that Congress's stated intent to maintain state regulation of "customer billing information and practices and billing disputes and other consumer protection matters"" somehow permits regulation of ETFs. This result is neither justified by Commission precedent, nor demanded by ***NASUCA.***

In *Pittencrieff*, the Commission also held that state action is not preempted merely because it increases carrier costs that likely will be passed on to customers in the form of higher rates." State regulation of ETFs, however, is not rate regulation merely because it would increase carrier costs and. ultimately, customer rates. ETF regulation is rate regulation because it would amount to direct state interference in existing wireless rates and rate structures. Such regulation would directly control the extent to which carriers can offer discounted rate plans for a set term with an ETF to recoup lost revenue if a customer breaches his or her contract by terminating early. The Commission did not in *Pittencrieff* and has not in any other case permitted states to engage in this type of direct control over the rates and rate structures of wireless carriers.

'The Eleventh Circuit noted that virtually *any* regulation is likely to impose costs on carriers that would be passed on to customers and, therefore, to interpret Section 332 so broadly would cvisccrate any meaningful state regulation. We agree. There is a role for state regulation and those regulations typically result in increased costs which are ultimately borne by customers. The Commission, however, also must guard against the other extreme of construing "rates charged" so narrowly that it permits the states to establish control over CMRS rates through enforcement of regulations purportedly designed to regulate "other terms and conditions." Virtually any regulation of CMRS carriers can be framed as a "consumer protection matter" and many regulations of customer charges could be characterized as designed to resolve or avoid a "billing dispute." To preserve the distinction between "rates charged" and "other terms and conditions" the Commission should employ its historical, court-approved definition of rates as charges for services to establish that rate elements and rate structures that include ETFs are outside the reach of state authorities.

Classification of ETFs as "rates charged" will not disable the states from fulfilling the regulatory role assigned to them under Section 332(c)(3)(A). States may continue to regulate terms and conditions of wireless service that do not involve restrictions on wireless rates or rate structures. State regulators can, for example, continue to require that wireless carriers disclose to consumers all relevant terms of customer contracts. State courts can continue to entertain suits alleging that wireless providers failed to provide proper disclosure. States also can continue to adjudicate *hona*

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[15] *Id.* (citing Pittencrieff Communications, Inc., *Memorandum* ***Opinion and Order,*** 13 FCC Rcd 1735 (1997)).

[16] In *Pittencrieff*, the Commission held that the USF charges at issue were specifically authorized by Section 254(f) of the Communications Act. *Pittencrieff*, 13 FCC Rcd at 1745, 1746-50.

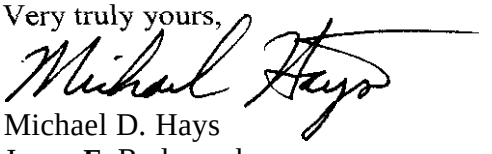
[17] *Id.*

[18] *Pittencrieff*, **I3** FCC Rcd at 1745.

fide hilling disputes and they can continue to enforce state consumer protection and false advertising laws. The only limitations are that these laws and state action may not **seek** to control wireless rates or constrain wireless carriers' flexibility in structuring their rates. Specifically with regard to ETFs, states can act to ensure that such charges are fully disclosed to consumers. Under *NASUCA*, states may even be permitted to require wireless carriers to disclose on each customer bill the discount they receive as a result of their ETF-enabled term-contract. **A** Commission ruling classifying ETFs as rates simply would bar state regulators and courts from retroactively or prospectively invalidating, outlawing, or controlling whether and what level of ETFs carriers may charge.

Finally, as noted in SunCom's Comments in these proceedings, the Commission can resolve the common issues raised in both the SunCom and CTIA petitions in a single order that treats the predominant common elements of the petitions together and addresses the unique aspects of SunCom's petition as the Commission deems necessary and appropriate." The Commission should note that CTIA also has requested that the petitions be consolidated.[20] The common declarations sought by SunCom and CTIA include the requests that the Commission: (1) declare that ETFs are "rates charged" within the meaning of Section 332(c)(3)(A); and (2) clarify that states are barred from employing equitable contract doctrines or other regulatory tools to make determinations regarding the reasonableness of wireless ETFs. The statute, the record, Commission precedent, and the *NASUCA* decision itself support these rulings, and the opponents in these proceedings have failed to demonstrate otherwise.

Very truly yours,



Michael D. Hays
Jason **E.** Rademacher
Counsel for SunCom Wireless
Operating Company, L.L.C.

Michele C. Farquhar
Counsel for SunCom Wireless
Operating Company, L.L.C.
Hogan & Hartson LLP
555 13th Street, N.W.
Washington, D.C. 20004

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[19] ('omtnents of SunCom Wireless Operating Company, L.L.C. on Debra Edwards' Opposition and Cross-Petition for Declaratory Ruling, WT Docket Nos. 05-193, 05-194, at 5 & n.7 (filed August 5, 2005). The Commission **also** can resolve the many issues raised by Debra Edwards' Cross-Petition for Declaratory Ruling in the same order. Though Ms. Edwards requested nine declaratory rulings, SunCom explained in detail why: (1) most of her requested rulings merely repeat what SunCom and CTIA already have requested; (2) many of the requested rulings seek findings of fact and conclusions of law that are appropriately within the jurisdiction of the South Carolina court.

[20] CTIA Petition, Summary, pp. 3-4 & n.2 (filed March 15, 2005).

cc: Cathy Seidel
Jay Keithley
Erica McMahon
Pam Slipakoff
Richard Smith
Michael Jacobs